

an incident to the operation of an enterprise of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for such operation. Accordingly, a boarding house is not a "restaurant" within the meaning of section 13(b)(8), nor are the dining facilities of a boarding school, college or university which serve its students and faculty, nor are the luncheon facilities provided for private and public day school students, nor are other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

§ 779.388 Exemption provided for food or beverage service employees.

(a) A special exemption is provided in section 13(b)(18) of the Act for certain food or beverage service employees of retail or service establishments. This section excludes from the overtime pay provisions in section 7 of the Act, "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs." This is an employee exemption, intended to apply to employees engaged in the named activities for such establishments as "drug stores, department stores, bowling alleys, and the like." (S. Rept. No. 1487, 89th Cong., second session, p. 32.)

(b) The 13(b)(18) exemption will apply only if the following two tests are met:

(1) The employee must be an employee of a retail or service establishment (as defined in section 13(a)(2) of the Act); and

(2) The employee must be employed primarily in connection with the specified food or beverage service activities. If both of the above criteria are met, the employee is exempt from the overtime pay provisions of the Act.

(c) The establishment by which the employee is employed must be a "re-

tail or service establishment." This term is defined in section 13(a)(2) of the Act and the definition is quoted in § 779.24; the application of the definition is considered at length earlier in this subpart. In accordance with this definition, the establishment will be a "retail or service establishment" for purposes of section 13(b)(18) if 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(d) If the establishment comes within the above definition it is immaterial that the establishment is in an enterprise or part of an enterprise described in section 3(s). Thus section 13(b)(18) will be applicable regardless of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part. It should also be noted that it is not required that the establishment make more than 50 percent of its annual dollar volume of sales within the State in which it is located. The establishment by which the employee is employed, provided it qualifies as a "retail or service establishment," may be a drug store, department store, cocktail lounge, night club, and the like.

(e) This exemption does not apply to employees of the ordinary bakery or grocery store who handle, prepare or sell food or beverages for human consumption since such food or beverages are not prepared or offered for consumption "on the premises, or by such services as catering, banquet, box lunch, or curb or counter service * * *."

(f) If the establishment by which the employee is employed is a "retail or service establishment," as explained above, he will be exempt under section 13(b)(18) provided he is employed primarily in connection with the preparation or offering of food or beverages for human consumption either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. An employee employed in the actual preparation or serving of the food or beverages or in activities closely related and directly

§ 779.400

essential to the preparation and serving will be regarded as engaged in the described activities. The exemption, therefore, extends not only to employees actually cooking, packaging or serving food or beverages, but also to employees such as cashiers, hostesses, dishwashers, busboys, and cleanup men. Also, where the food or beverages are served away from the establishment, the exemption extends to employees of the retail or service establishment who make ready the serving place, serve the food, clean up, and transport the equipment, food and beverages to and from the serving place.

(g) For the exemption to apply, the employee must be engaged “primarily” in performing the described activities. A sales clerk in a drug store, department store or other establishment, who as an incident to his other duties, occasionally prepares or otherwise handles food or beverages for human consumption on the premises will not come within the scope of this exemption. The exemption is intended for employees who devote all or most of their time to the described food or beverage service activities. For administrative purposes this exemption will not be considered defeated for an employee in any workweek in which he devotes more than one-half of his time worked to such activities.

Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments

GENERAL PRINCIPLES

§ 779.400 Purpose of subpart.

The 1966 amendments to the Act changed certain existing provisions and added other provisions pertaining to exemptions from the requirements of sections 6 and 7 with respect to certain employees. This subpart deals with those exemptions provisions of interest to retail or service enterprises or establishments.

29 CFR Ch. V (7–1–11 Edition)

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

§ 779.401 Statutory provision.

Section 13(a)(1) of the Act provides that the provisions of sections 6 and 7 shall not apply with respect to:

Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

§ 779.402 “Executive” and “administrative” employees defined.

The terms “executive” and “administrative” as used in section 13(a)(1) of the Act are defined and delimited in subpart A of part 541 of this chapter and explained in subpart B of that part. These regulations are applicable under the amended section 13(a)(1) in determining which employees are bona fide executive or administrative employees. The clause that is enclosed in parentheses in section 13(a)(1) and which reads “including any employee employed in the capacity of academic administrative personnel for teacher in elementary or secondary schools” was added by the 1966 amendments to the Act. This clause will not have any affect in the application of the regulations to retail or service establishments. The Act and the regulations point out the fact that an executive or administrative employee of a retail or service establishment may devote up to 40 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative activities and still qualify as a bona fide executive or administrative employee. However, in other types of